

ELECTIONS - SPECIAL
SHERIFF - VACANCY IN OFFICE

) Nominations of candidates in special election to fill vacancy in sheriff's office must be made by central committee or by convention.

6-23
June 23, 1933.



Hon. William H. Sapp
Prosecuting Attorney
Columbia, Missouri

Dear Mr. Sapp:

This department acknowledges receipt of your letter of June 21st, 1933, as follows:

"Roger Wilson, the duly elected sheriff of Boone County, was murdered by highwaymen on the 14th day of this month. Section 11523 of the Revised Statutes of Missouri for the year of 1929 provides that a special election shall be held within thirty days after the date of his death to elect his successor. This section further provides that said election shall be held in pursuance of the general election laws of this state. The question naturally arises as to how the candidates at this special election shall get their names upon the ticket. Some of the attorneys here hold that Article 4 of Chapter 61 of the statutes provides the method.

I call your attention especially to Section 10241 requiring the certificate of the candidate therein mentioned to be signed by at least two per cent of the voters voting at the last election; and to Section 10245, which provides among other things that such certificates of nomination shall be filed with the Clerk of the County Court not more than sixty nor less than fifteen days before the date of the election. The election must be held under Section 11523, within thirty days, so Section 10245, supra, permitting the certificates of nomination therein mentioned to be filed as much as sixty days

prior to the date of the election, must not refer to special elections of the instant character. Personally, I seriously doubt whether Article 4 of Chapter 61 can be applied to the contemplated election. Many lawyers here believe that the County Clerk should receive and place upon the ticket the name of any person who may see fit to become a candidate for this office. Of course, all the candidates should be qualified to fill the office if elected.

In view of the conflict in opinions and of the absence of any case law controlling the question, I hereby request an opinion from your department upon the points hereinbefore suggested. I trust you will be able to furnish this opinion at an early date because our election will be held July 14th and for that reason we have very little time to act."

Section 11 of Article V of the Constitution provides that when any office shall become vacant the Governor, unless otherwise provided by law, shall appoint a person to fill such vacancy.

Section 10216 R. S. Mo. 1929, excepts a vacancy in the office of sheriff from the vacancies the Governor is entitled to fill when a vacancy occurs.

Section 11523 R. S. Mo. 1929, with reference to filling a vacancy in the office of sheriff of any county in this State provides in part,

"Whenever, from any cause the office of Sheriff becomes vacant, the same shall be filled by the county court; if such vacancy happen more than nine months prior to the time of holding a general election, such county court shall immediately order a special election to fill the same * * * . Such election shall be held within thirty days after the vacancy occurs, and the county court shall cause notice of the same to be published in some newspaper published within the county, * * * Upon the occurrence of such vacancy,

it shall be the duty of the presiding judge of the county court if such court be not then in session, to call a special term thereof, and cause said election to be held in pursuance of the provisions of this section, and the election laws regulating general elections in this state."

An office is vacant whenever it is unoccupied or there is no person to fill such office.

Mays v. Bassett, 125 P. 609.

According to your letter the sheriff of Boone County departed this life on June 14th, 1933, and the office of sheriff of that County thereupon became vacant. The time for holding the next general election in Boone County will be in November, 1934, and hence more than nine months beyond the occurring of the vacancy referred to. Therefore, all the elements and facts exist for the calling of a special election in Boone County to fill the vacancy in the office of sheriff and by your letter we are informed such special election has been called and is to be held on July 14th, 1933.

State ex rel. v. Patterson, 207 Mo. 129.

In reaching a conclusion on the question presented, we will have safter footing if we begin at the root of the matter.

Section 10244 R. S. Mo. 1929, dealing with nominations for office and with reference to the certification of the names of candidates nominated at a primary provides that no certificate shall contain the name of more than one candidate for each office. This refers to the nomination of candidates for the general election.

Section 10300 of Article VII, pertaining to the form of ballot for use in general elections, provides in part,

"The names of all candidates to be voted for in each election district or precinct shall be printed on one ballot; all nominations of any political party or group

of petitioners being placed under the party name designated by them in their certificates of nomination or petitions, and the ballot shall contain no other names."

All of which leads to the conclusion that at an election to be held, where an official is to be selected by ballot, the name of only one person can appear on such ballot as the candidate of any political party or the candidate of any group or groups of petitioners, according to the number of the petitioning groups.

There is a well recognized and defined theory, philosophy and principle of law that the citizens of our Nation or a State thereof have the qualified right to express their allegiance to certain principles as adopted by an existing political party or as may be declared by certain allowed petitioning groups. See State ex rel. v. Kortjohn, 246 No. 34. As a practical matter this expression can only be given force and effect, and the voter could select among the various and contending single candidates representing the various and contending political views and creeds, where each party or group was represented by but one candidate.

At the special election to be held in Boone County on June 14th, next, voters are entitled to choose between a candidate selected by each of the existing political parties, as well as the candidate or candidates selected by such petitioning group or groups as may lawfully procure the name or names of candidates on the ballot, and the ballot shall contain no other name or names than the respective candidates of the existing political parties or group or groups as may have been selected or nominated, and according to Section 10300 the party name shall be printed above the name of the respective candidates and the party candidates shall be in separate columns with a heavy line between the names of each party list or the lists of each petitioning group or groups. The law of this State, by direct reference, does not make provision for the nomination of candidates to appear on the ballots as above required in the case presented by you, and as to how such nominations shall be made and the result above required shall be brought about, is the real question in this case.

We can perhaps reach a conclusion more directly by a process of elimination.

Section 10253 of Article V, dealing with primary elections, specifically provides that such Art. V, shall not apply to special elections. That the election to be held in your County on July 14th, next, is a special election there can be no doubt. Hence, the nominations to be made for candidates whose names shall appear on ballots at that election cannot be selected under the general primary election law in force in this State.

State ex rel. v. Patterson, supra.

And we must seek some other mode of choosing such nominees.

Section 10268 of Article V, under the heading of "Primary Elections" provides as follows:

"VACANCIES, HOW FILLED. Vacancies occurring after the holding of any primary or where no person shall offer himself as a candidate before such primary, shall be filled by the party committee of the district, county or state, as the case may be: Provided, however, that no name shall be allowed on any ticket until the required fee shall have been paid."

Section 10245 of Article IV, under the title of "Nominations", provides in part as follows:

"Certificates of nomination herein directed to be filed with the clerk of the county court of each county shall be filed not more than sixty days and not less than fifteen days before election: Provided, that in case of any vacancy in said nomination, by resignation, death or otherwise, the central committee, or a convention called for that purpose, of the party on whose ticket such vacancy may occur, may select and certify to the secretary of state, county clerk or board of election commissioners the name or names of candidates to fill such vacancy: Provided, that the certificates of nomination to fill vacancy shall be filed with the secretary of state not later than fifteen days

before the day fixed by law for the election of the persons in nomination, and with the board of election commissioners or county clerk not later than ten days before such election: "

It may occur at first blush that the two sections of the statutes last referred to have to do only with vacancies occurring in nominations and does not apply where a vacancy occurs in an office and nominations of candidates to fill same must be made. However, the Supreme Court of this State in State ex inf. Barrett v. McClure, 299 Mo. 688, has definitely settled the question to the contrary. In the latter case, one McClure was elected to the office of Treasurer of Harrison County on November 2nd, 1920, for a term of four years beginning April 1st, 1921. McClure qualified and entered upon the duties of his office and continued therein until the 3rd day of August, 1922, when he died. In the year 1922, the state-wide primary was held on the first day of August and the time for candidates to file the nomination for such primary expired on the first day of June prior thereto. The county central committee of the Republican Party in Harrison County in September, 1922, nominated one Shumard as candidate for the office of county treasurer and his name was placed on the official ballot as such candidate, and at the following general election he was elected as treasurer of the county. On the 12th day of August, 1922, the respondent had been appointed by the Governor as Treasurer of Harrison County. She refused to yield the office to relator, hence quo warranto was brought. The Court at page 693 and subsequent pages of the opinion states the contentions of the parties and its conclusions of law as follows:

"The argument is that 'the next general election,' as contemplated in the primary law, means an election at which all the machinery of election shall be called into play, including the primary election law. Since the time for filing by a candidate at the primary expired June first, 1922, and the election took place August first, and since Joseph B. McClure died August third, there was no possibility of a candidate for the office of Treasurer to be nominated at the primary. A part of the general process by which a candidate is elected to office being inoperative, because the time in which a candidate may avail himself of it having expired, there could be no legal election to fill the unexpired term at the November election, 1922.

The rulings of this court have been contrary to the position of respondent. Graves, J., in his opinion in the case of State ex rel. v. Roach, 269 Mo. 500, stated the argument in favor of respondent's position with all the force and clearness of which it is capable. A majority of the court, however, failed to concur on that proposition, and the case was decided upon another point in which the majority concurred.

It is further contended that under the terms of the statutes quoted a political committee could fill only a vacancy on the ticket nominated; that vacancies referred to do not mean vacancies in an office. Of course a political committee can fill only a vacancy occurring on the ticket nominated. But there is no reason for saying that such a vacancy could occur only by the death, resignation or removal of a candidate nominated. Section 4786 provides for the election of someone to fill an unexpired term where the vacancy in the office occurs before a general election. By the force of that statute a vacancy in an office, occurring after a primary election, creates on the nominated ticket a vacancy which did not exist prior to the occurrence of the vacancy in the office, a vacancy which Section 4838, Revised Statutes 1919, authorized the political committee to fill.

In the case of State ex rel. v. Hostetter, 137 Mo. 636, where it was contended that a vacancy meant a vacancy in the nomination and not a vacancy in the office, this court said, l. c. 644-645, that where by reason of death a vacancy occurs in an office shortly before the general election at which someone to fill the office for the unexpired term should be chosen, 'and no one has been nominated to said office, there is a vacancy in the nominations within the meaning of the election law,' and that such vacancy might be supplied at any time prior to the election by a nomination authenticated in the mode pointed out by the ballot law.

In State ex rel. v. Kortjohn, 246 Mo. 1. c. 42, this court, in considering Section 4838, Revised Statutes 1919, said: 'This section is broad enough to permit the party committee of such party to fill any and all vacancies upon their party ticket.'

These direct rulings by this court, and the attitude of the majority in the Roach Case, makes clear the accepted doctrine that a party committee has authority to fill any vacancy which happens to be upon the nominat-ed ticket, no matter how or when that vacancy occurs, whether by the death or resignation of someone nominated, or by the failure or inability of the electors at the primary to make a nomination."

Along the same line, the case of Heney v. Jordan, 175 P. 402, construing the California primary law, at page 405 of the opinion said,

"It is clear that the term 'vacancy', as used in this section, refers to any case where, from any cause, there is no nominee of the party for an office."

Also, in State v. Akin, 79 S. W. 805, the Supreme Court of Tennessee at page 806 held,

"Not only, under this construction, are the justices of the peace for four districts left unaffected, but the places of the justices for the other five civil districts can be filled by an election held after 10 day's notice given by the proper authorities, for, notwithstanding these five are new districts, yet the places to be filled in them are 'vacancies' within our statutes."

Sections 10241 and 10242 in our opinion, refer only to nominations made by newly created or formed political parties and not to nominations made by then existing political organizations, such as the Democratic or Republican Parties. We think this position is sustained, not only by the context of

the sections referred to, but by the cases of,

State ex rel. v. Kortjohn, 246 Mo. 34;
State ex rel. v. Seibel, 295 Mo. 607, 246 S. W. 288;
20 C. J. p. 109 Sec. 104 p. 127 Sec. 146.

We are of the opinion that a vacancy exists in the office of Sheriff of Boone County as to all existing political parties and that a vacancy exists as to candidates for nominations in all existing political parties to be voted for at the special election to be held July 14th, 1933.

We are further of the opinion that the vacancy as to such candidates to be voted on at the special election can only be supplied or filled by either the central committee or convention of each of the existing political parties in Boone County, or candidates of petitioning groups.

We are further of the opinion that it is within the discretion of the respective central committees as to whether such vacancies will be filled by such committee or by party convention. If the nominations are to be made by convention the respective central committees should promulgate rules as to the time and manner of holding such convention and as to how and when the same shall be composed, organized and its business disposed of.

Beene v. Waples, 187 S. W. 191, 193;
20 C. J. 137.

After such nominations are made, the names of the selected candidates should be duly certified to the county clerk and the special election held according to the general election law of the State of Missouri.

State ex rel. v. Patterson, 207 Mo. 129.

Yours very truly,

GILBERT LAMB
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.